Bloomberg Law

Benefits & Executive Compensation News

USC Retirement Plan Battle Could Alter Class Action Landscape

By Jacklyn Wille

Posted May 10, 2018, 5:31 AM

- Ninth Circuit will consider whether employers can use arbitration agreements to avoid ERISA class actions
- Case against USC could affect pending suits against Franklin Templeton, Charles Schwab
- Supreme Court expected to rule on related question soon

A pending lawsuit against the University of Southern California could have big implications for employers that want to avoid class actions targeting their retirement plans.

The U.S. Court of Appeals for the Ninth Circuit will hear arguments May 15 in a case challenging the fees and investment funds associated with USC's retirement plans, which hold more than $4.4 billion and cover tens of thousands of people. The court is tasked with answering a question few courts have considered: Can arbitration clauses in employment agreements stop workers from bringing class actions challenging how their retirement plans are managed?

Several courts have allowed employers to force arbitration in employee benefits lawsuits governed by the Employee Retirement Income Security Act. In this case, USC wants to use a worker's employment agreement—which included an arbitration clause and was signed as a condition of employment—to block a proposed class action that could affect tens of thousands of workers. A federal judge in California said USC couldn't do this because the lawsuit raised fiduciary breach claims that are, by statute, brought on behalf of the retirement plans in their entirety. Individual workers can't sign away the plans' right to litigate this issue, the judge said.

Arbitration is an alternative to litigation that employers sometimes prefer because of its confidentiality and ability to control costs. Arbitration agreements typically include class action waivers, which bar employees from participating in class actions against their employers.

A victory for USC could be great news for employers, because it could give them a new tool for avoiding expensive ERISA class actions and litigation more generally. Conversely, a loss for the school could give workers an incentive to bring more ERISA lawsuits, René E. Thorne, an employee benefits attorney and office litigation manager for Jackson Lewis' New Orleans office, told Bloomberg Law.

Magic Bullet?

Given the number of high-profile ERISA class actions filed in the past few years, many employers may be looking for ways to avoid becoming the next defendant. More than 130 proposed class actions involving 401(k)-style retirement plans have been filed since 2016, according to a Bloomberg Law analysis. Targeted employers include Wells Fargo , Phillips 66 , General Electric , JPMorgan , Target , and Northrop Grumman .

A ruling in favor of USC could make arbitration agreements look more attractive to employers, but judicial permission to avoid ERISA class actions through arbitration agreements might not be a "magic bullet" for employers. That's partly because of the logistical difficulties large employers would face in obtaining these agreements from their existing workers, Heather M. Mehta, an associate with Greensfelder Hemker & Gale PC, told Bloomberg Law.

"We've been wondering if this could be a magic bullet to stop ERISA class actions," said Mehta, who focuses on employee benefits litigation and compliance in the firm's St. Louis office. "But I've never been at the point where I was ready to advise clients, 'yes, this is the path to go down.'"

Employers with a long-standing practice of including arbitration clauses in employment agreements might be well-positioned if the Ninth Circuit rules for USC, Mehta said. "But if you needed to go back and retroactively collect these consents from 20,000 employees, that would be a big hurdle to overcome," she added.

Incentive to Sue

On the other hand, a Ninth Circuit ruling against USC could set off more ERISA litigation. If the court holds that arbitration agreements can't block ERISA fiduciary breach claims, that could give workers an incentive to bring more of these claims in federal court, Jackson Lewis' Thorne said.

If the Ninth Circuit upholds the decision against USC, it would "incentivize all plaintiffs, even in individual cases," to bring fiduciary breach claims under Section 502(a)(2) of ERISA "to avoid any arbitration agreement to which they agreed," Thorne told Bloomberg Law in an email.

Think It Through

Employers should think carefully about whether they would want to insulate themselves from ERISA litigation through arbitration agreements, Mehta said.

"It may help you get out of class actions, but do you really want arbitration for all your ERISA disputes?" she said.

Big class actions over retirement plan fees garner headlines and rack up legal fees, but the vast majority of ERISA cases filed by individual workers seek welfare benefits under disability or health plans. For these cases, many employers may be more comfortable being in federal court, Mehta said.

"Many employers are generally happy with ERISA resolution of claims through the court system," Mehta said. "You get *Firestone* deference, typically not much discovery, and it can be a fairly efficient process for resolving claims. If you're happy with that, I don't know if you want to switch and move to arbitration."

Don't Forget SCOTUS

Another wrinkle in the USC case? The U.S. Supreme Court may resolve—or at least opine on—the relevant legal questions before the Ninth Circuit can issue its ruling.

"As to the long-term effects of any decision, it seems likely that before the Ninth Circuit hands down its decision, we may get some useful guidance from the Supreme Court in the upcoming decision in the *Murphy Oil* case where the Court will be called upon to decide whether arbitration agreements with individual employees that bar them from pursuing class or collective actions are valid," Thorne said.

Murphy Oil and related cases ask whether arbitration agreements in employment contracts are an unfair labor practice under federal labor law, which protects workers' right to bring class and collective actions. The Supreme Court is expected to decide *Murphy Oil* before the end of its current term in late June.

Although *Murphy Oil* involves labor law and not ERISA, the Supreme Court's ultimate decision could help guide employers and ERISA plans or potentially influence how the Ninth Circuit resolves the USC case.

Other Cases to Watch

Finally, the Ninth Circuit's eventual ruling in the USC case could alter the course of at least two pending ERISA lawsuits: one against Franklin Templeton and one against Charles Schwab. Both companies are accused of filling their workers' 401(k) plans with expensive and poorly performing in-house investment funds.

Franklin Templeton argued—unsuccessfully—that the class action should be dismissed because the former employee who sued signed a termination agreement that included a class action waiver when he left the company. Charles Schwab tried to send the case against it to arbitration, citing both an individual severance agreement and language in the plan document requiring arbitration of plan-related disputes.

In both cases, Judge Claudia Wilken of the U.S. District Court for the Northern District of California said the lawsuits were brought on behalf of the retirement plans, rather than individual workers. Therefore, contracts signed by individual workers couldn't limit the plans' right to litigate. In the Schwab case, Wilken said the arbitration language in the plan document wasn't binding because it was added after the worker who sued left the company.

Both cases, if appealed, would ultimately go before the Ninth Circuit, making that court's eventual decision in the USC case especially significant.

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

To contact the editors responsible for this story: Jo-el J. Meyer at jmeyer@bloomberglaw.com; Martha Mueller Neff at mmuellerneff@bloomberglaw.com

Bloomberg Law